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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTION PRESENTED

Whether, under the Supremacy Clause, the Occupational Safety and Health Act ("OSH Act" or "OSHA") of 1970 preempts state criminal prosecutions of employers based on conduct or conditions regulated by the Act, when the conduct and conditions in question are in compliance with the Act's standards and requirements.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following are additional petitioners:

Gerald Colby
Anthony Jordan
Kevin Keane
Allan Simon
Chicago Magnet Wire Corporation

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v.

STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Frank Asta, Gerald Colby, Anthony Jordan, Kevin Keane, Allan Simon and Chicago Magnet Wire Corporation ("petitioners") hereby petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (app. at 1-17) is reported at 534 N.E.2d 962 (1989). The opinion of the Appellate Court of Illinois, First Judicial District (app. at 18-24) is reported at 510 N.E.2d 1173 (1987). The opinion of the Circuit Court of Cook County (app. 25-31) is not reported.

JURISDICTION

The opinion of the Illinois Supreme Court was entered on February 2, 1989. On March 16, 1989, Justice Stevens extended the time for filing a petition to and in-

cluding May 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3); *see Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .

U.S. Const. art. vi, cl. 2.

Section 18(a) of the Occupational Safety and Health Act of 1970 provides:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a).

Section 18(b) of OSHA provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b).

Section 4 of OSHA provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory

> rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4).

STATEMENT

A. The Occupational Safety and Health Act of 1970

In 1970, Congress enacted the Occupational Safety and Health Act to establish "uniformly applied occupational safety and health standards." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 1 (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970* ("*OSH Act Legis. Hist.*") at 141 (1971). In passing this law, Congress recognized that a solution to the problem of workplace safety required "comprehensive Federal legislation which would apply to all industries, and in a single national effort. . . ." *See* 116 Cong. Rec. 35607 (Oct. 8, 1970), *reprinted in OSH Act Legis. Hist.* at 297. Congress made the OSH Act comprehensive because it found that no one benefited from the irregular standards and enforcement practices then existing among individual states; uniformity was deemed essential for the sake of employees and employers alike.[1]

Congress understood that "the development of occupational health and safety standards involves technical and complex problems requiring professional expertise and competence." S. Rep. No. 91-1282 at 63, *reprinted in OSH Act Legis. Hist.* at 202; *see also* S. Rep. No. 91-1282

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[1] In addition to its concern for employee health and safety, Congress was concerned about the disparate treatment of employers from state to state and the competitive disadvantages imposed upon "conscientious" employers. 116 Cong. Rec. 37325 (Nov. 16, 1970), *reprinted in OSH Act Legis. Hist.* at 413. Thus, it saw a need to provide for "fair and even" enforcement. 116 Cong. Rec. 36513 (Oct. 13, 1970), *reprinted in OSH Act Legis. Hist.* at 324.

at 1-7, *reprinted in OSH Act Legis. Hist.* at 141-147. Thus, the OSH Act requires that federal "[d]evelopment of standards . . . shall be based upon research, demonstrations, experiments, and such other information as may be appropriate." 29 U.S.C. § 655(b)(5).

The standards promulgated under OSHA were intended by Congress to reflect a delicate balancing of competing interests, measured by the best available scientific evidence. The Secretary of Labor is specifically directed to take account of "other considerations"—including "feasibility" and "experience"—in addition to the "highest degree of health and safety protection" in promulgating standards. *Id.* Thus, an "occupational safety and health standard" is defined as a standard which is "*reasonably necessary or appropriate* to provide safe or healthful employment . . . ." 29 U.S.C. § 652(8) (emphasis added). Exposure standards for toxic substances are set at a level "which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer *material* impairment of health . . . ." 29 U.S.C. § 655(b)(5) (emphasis added). In fact, Congress specifically revised an earlier draft of the OSH Act "to make it perfectly clear that it does not require . . . standards that would assure an absolutely risk-free workplace." *See Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 641, 646-649 (1980) (Stevens, J.) (Noting that "the legislative history . . . supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Id.* at 646.). *See* discussion, *infra* at 15.

The legislative history of the OSH Act also makes clear that Congress sought to encourage employer cooperation. Thus, Congress expressly intended that the purposes of the Act would be best achieved through "preventative rather than punitive" means. 116 Cong. Rec. 42203 (Dec. 17, 1970), *reprinted in OSH Act Legis. Hist.* at 1210. In this regard, Congress expressly considered the

inclusion of criminal penalties in the Act and decided that they would be limited.[2]

In providing for comprehensiveness and uniformity, Congress did not intend to preclude any state involvement in the field of occupational health and safety. Rather, Congress undertook to balance "the legitimate rights and interests of the States and the proper role of the Federal Government," 116 Cong. Rec. 38384 (Nov. 23, 1970), *reprinted in OSH Act Legis. Hist.* at 1025, and expressly delineated the proper state role in regulating and enforcing workplace conduct and conditions.

Section 18(a) provides that a state may assert "jurisdiction" under state law "over any occupational safety or health issue with respect to which no standard is in effect . . . ." § 18(a), codified at 29 U.S.C. § 667(a). By its terms, Section 18(a) expressly grants the states authority or jurisdiction over workplace conditions which are not regulated by the federal government under the OSH Act. Section 18(b) sets forth the state's role where OSH Act standards are in effect. It authorizes state action, but only pursuant to a federally approved state plan. To be approved, the state plan must provide for development and enforcement of health and safety standards which "are or will be at least as effective [as OSH Act standards] in providing safe and healthful employment."

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[2] Congress carefully considered and debated whether the OSH Act should contain criminal penalties for violations and, if so, the appropriate penalties. *See* 116 Cong. Rec. 37338 (Nov. 16, 1970), *reprinted in OSH Act Legis. Hist.* at 425; 116 Cong. Rec. 37625-26 (Nov. 17, 1970), *reprinted in OSH Act Legis. Hist.* at 511; S. Rep. No. 91-1765 at 41, *reprinted in OSH Act Legis. Hist.* at 1194; 116 Cong. Rec. 42203, 42205 (Dec. 17, 1970), *reprinted in OSH Act Legis. Hist.* at 1210, 1214. The final Senate bill imposed criminal penalties for wilful violations; the final House bill imposed civil penalties only. The compromise reached and embodied in the conference bill provided criminal penalties for only those wilful violations that result in death. S. Rep. No. 91-1765 at 41, *reprinted in OSH Act Legis. Hist.* at 1194.

§ 18(c)(2), codified at 29 U.S.C. § 667(c)(2). Where a proposed state standard is applicable to products distributed in interstate commerce, it will be approved only if the state can show that the state standard is "required by compelling local conditions" and does "not unduly burden interstate commerce." *Id.* Thus, states have the option of establishing equally effective standards or enforcement mechanisms only if they obtain prior federal approval to do so.[3]

Section 4, codified at 29 U.S.C. § 653(b)(4), is a "savings clause" which says nothing about state regulation, but instead addresses the effect of the OSH Act on *private* rights of action existing under state common law or statutes. Section 4 provides that nothing in the OSH Act shall affect the "workmen's compensation law" or other "common law or statutory rights, duties or liabilities of employers and employees" that might arise in connection with workplace conditions. By its terms, Section 4 "saves" only actions between *employers and employees* which arise under state law. Section 4 says nothing about state-initiated enforcement actions, whether civil or criminal in nature. Certainly, neither the statute nor its legislative history suggests that Section 4 was intended to preserve state-initiated actions where such ac-

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[3] Several states in fact have done so. For example, under Arizona's state plan, a wilful violation resulting in the death of an employee is punishable by a fine of up to $150,000 against an individual and $1,000,000 against a corporation and imprisonment for up to one and one-half years. Ariz. Rev. Stat. Ann. § 23-418. Under Puerto Rico's plan, a wilful violation causing death may result in imprisonment for up to three and one-half years for the first violation, and up to four and one-half years for a second violation. P.R. Laws Ann. tit. 29, ch. 16 § 361x. North Carolina's state plan expressly provides for the application of state general criminal laws for wilful violations that result in death. N.C. Gen. Stat. § 95-139. Illinois, however, does not have a state plan in effect. A plan was submitted by the State and approved in November 1973, but was withdrawn by the State in June 1975.

tions otherwise would be expressly preempted under Section 18(b).

B. Proceedings in the Lower Courts

Petitioners are five individual officers and agents of Chicago Magnet Wire Corporation ("CMW") and the corporation itself. CMW is an Illinois-based manufacturer of coated wire. During the relevant period, Anthony Jordan was the president of CMW, Kevin Keane was the plant manager, Frank Asta was the maintenance foreman, Allan Simon was the plant engineer and Gerald Colby served in several supervisory positions in the areas of engineering, maintenance and quality control. Petitioners were indicted under the Illinois penal code in June, 1985 by a Cook County, Illinois grand jury. Each petitioner was charged with multiple counts of aggravated battery and reckless conduct under Ill. Rev. Stat. ch. 38, §§ 12-4(a), (c) and 12-5. (App. at 32-34.) The individual petitioners also were charged with conspiracy to commit aggravated battery under Ill. Rev. Stat., ch. 38, § 8-2(a). (App. at 31-32.) [4]

The indictments alleged that certain CMW employees sustained injuries due to (1) exposure of the employees to OSHA-regulated substances, (2) failure to provide necessary safety equipment and health monitoring systems, and (3) maintenance of dangerous working conditions. According to the indictments, which read like an OSHA notice of violation, the acts of the defendants constituted a violation of the defendants' "duty to provide . . . safe" workplaces for their employees. The indictments strikingly fail to allege that the defendants had violated OSH Act regulations. In fact, the State has

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[4] The individual petitioners each were charged with 52 counts of aggravated battery, 41 counts of reckless conduct and one count of conspiracy. If convicted, they face up to 10-20 years imprisonment and $571,000 in fines. *See* app. at 31, 33, 34; Ill. Rev. Stat., ch. 38, ¶¶ 1005-8-1, 1005-8-3, 1005-8-4, 1005-9-1.

never contested petitioners' claim that the conduct and conditions at issue were in full compliance with OSH Act regulations and standards. Instead, the State has argued that compliance with OSH Act regulations and standards is irrelevant in the context of a state criminal prosecution.

Petitioners moved in the Circuit Court of Cook County to dismiss the indictments for failure to state an offense on the ground that, under the Supremacy Clause, the OSH Act preempted this state prosecution because all of the conduct and conditions in question were regulated by the Act and because petitioners were in compliance with those regulations.[5] On December 13, 1985, the court granted the motion and dismissed the indictments. The court held that the OSH Act preempted the state prosecutions based upon the conduct at issue which, the court found, was pervasively regulated under the OSH Act. App. at 29-30.

The Appellate Court of Illinois affirmed. It relied primarily upon the comprehensive nature of the OSH Act and the fact that it provides states the opportunity to develop and enforce their own occupational safety and health schemes if they obtain federal approval in advance. Based upon the legislative history of the Act, the court concluded that Congress intended the imposition of criminal sanctions for OSH Act-regulated activities only in "highly limited circumstances." App. at 24. Congress provided that "health and safety requirements should be established through standard-setting" and administrative enforcement "which provides employers with clear and detailed notice of their legal obligations." *Id.* The im-

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[5] Petitioners argued, in the alternative, that the indictments should be dismissed because they violated defendants' rights under the Due Process Clause of the United States Constitution. This claim was not decided by any of the courts below and is not now before this Court.

position of criminal liability regardless of compliance with OSH Act standards "would lead to piecemeal and inconsistent prosecutions of regulatory violations," which Congress sought to avoid. *Id.* The court observed that application of state criminal laws would not be foreclosed "if the prosecutions charged the defendants with crimes not involving working conditions." App. at 23. But this case is different, the court reasoned, because "[t]he conduct the State seeks to regulate here, . . . as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA." *Id.*

The Illinois Supreme Court reversed. The court distinguished state "police power"—which it held that Congress, in enacting OSHA, did not intend to preempt—from an exercise of regulatory authority over workplace conditions, which Congress did intend to preempt. App. at 8-10. The court rejected petitioners' argument that the imposition of criminal penalties in this context was intended to, and did, operate as a form of "regulatory" control, *i.e.*, criminal sanctions would deter undesirable conduct and coerce compliance with standards acceptable to the state. App. at 6-8. Instead, the court held that imposition of criminal sanctions was analogous to imposition of punitive damages in torts. App. at 10. According to the court, Congress, in saving tort remedies from preemption in Section 4, also intended to "save" state criminal penalties.

The court then considered whether such state criminal prosecutions conflict with the regulatory structure of the OSH Act, and concluded that they do not. To the contrary, the court held that such prosecutions further the goal of protecting workers by providing additional sanctions for harmful workplace conditions and ensuring that responsible persons receive "appropriate punishment." App. at 15. The court acknowledged that Congress had "invited" state participation in health and safety regu-

lation through federally approved plans, but held that this merely "demonstrates that [Congress] did not intend to preclude supplementary State regulation." App. at 9. Accordingly, the court dismissed petitioners' constitutional defense based on the Supremacy Clause and therefore remanded the matter for prosecution.

REASONS FOR GRANTING THE PETITION

The decision of the Illinois Supreme Court exposes five individual employees and a corporation to criminal prosecutions potentially involving years of imprisonment and significant fines based on workplace conditions which have been comprehensively regulated by the federal government and were never alleged to have been in violation of any federal standard. Thus, it raises an important and recurring question of the scope of preemption under the Occupational Safety and Health Act of 1970. The analysis by the court below represents a serious misapplication of this Court's preemption holdings and conflicts with a number of other state court decisions which have held that no criminal prosecution is appropriate in the circumstances of this case. Finally, the decision below eliminates the uniformity of health and safety standards in the workplace that Congress believed to be vital to ensuring stable employment relations.

At bottom, the question whether an employer and managing employees can be exposed to criminal prosecutions by state authorities for conduct regulated by the OSH Act is one this Court eventually will have to decide. That issue is cleanly and squarely presented by the indictments in this case, which the Illinois Supreme Court has now held to be valid, regardless of the existence of, or compliance with, federal standards under the OSH Act. Because individuals should not be subject to potential criminal sanctions or the ordeal of a trial for conduct which Congress has removed from the reach of state criminal prosecutions—and because those individuals' susceptibility

to prosecution should not depend on the particular state in which they happen to live and work—the Court should grant the petition and resolve this important issue of federal law on which state courts have divided.

A.

1. Federal preemption of state law under the Supremacy Clause turns on congressional intent. Under the preemption doctrine, preemption is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982).[6] Where Congress intends a matter to be controlled exclusively by federal law, it is said to "preempt the field." In that situation, "any state law falling within that field is preempted," even if the state law complements federal statutory purposes or standards. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). *See also Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 155-156 (1942).[7]

In addition, preemption is required whenever state law actually conflicts with federal law. *See Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153; *Florida Lime &*

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[6] Thus, a finding of preemption may be based on the express language of the statute, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528-32 (1977), or implied from a reading of the statute as a whole, including its structure and legislative history, *see Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 386-387 (1983).

[7] Such preemption is implied where the scheme of federal regulation is so "pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the object sought to be obtained by the federal law and the character of obligations imposed by it" reveal the intent to displace state law. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153, citing *Rice*, 331 U.S. at 230.

Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 142-143 (1963). Conflict will be found where federal law and state law impose inconsistent duties making compliance with both impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1940). *See also Michigan Canners and Freezers Ass'n, Inc.* v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984); *Jones*, 430 U.S. at 526, 540-541.[8]

Preemption does not, as the court below suggested, turn on the type of state law involved. *See Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978). State laws of general applicability, criminal laws and administrative regulations all are subject to the dictates of the Supremacy Clause. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The "critical inquiry" is not whether the state law is a "regulatory" provision or a "general" criminal or tort law, but instead, whether the state law is brought to bear on conduct regulated under the preemptive umbrella of federal law. *Sears, Roebuck & Co.*, 436 U.S. at 197, 199. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Amalgamated Ass'n*

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[8] "The test of whether both federal and state regulations may operate . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142. Conflict in "technique" is considered as disruptive as conflict in "overt policy." *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971). In addition, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . ." *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153.

of Street, Electric Railway & Motor Coach Employees v. *Lockridge*, 403 U.S. 274, 292 (1971).

2. The decision of the Illinois Supreme Court is inconsistent with these basic principles of preemption doctrine as enunciated by this Court. Instead of carefully examining the language, structure and history of the OSH Act, the court simply engaged in an irrelevant analysis of the distinctions between state criminal laws and "regulatory" laws governing workplace conditions and the similarities between private tort actions and state criminal prosecutions. Thus, the court below has held that, in Illinois at least, traditional preemption doctrine does not apply to "general" criminal laws. But this Court consistently has rejected any such suggestion. *See, e.g., Sears, Roebuck & Co.*, 436 U.S. at 191-93; *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142; *see also Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153. If the court below had properly analyzed the problem, it would have concluded that, preemption is appropriate in this case (1) under the express terms of the statute, (2) as a matter of "preemption of the field" and (3) because of the conflict between federal and state standards.

First, examination of the statutory language demonstrates that this prosecution is expressly preempted by OSHA.[9] Sections 4 and 18 of the statute delineate the

[9] This Court's decisions regarding the preemptive effect of the Employee Retirement Income Security Act of 1974 ("ERISA") offer guidance in this regard. Like the OSH Act, ERISA contains express preemptive language and a savings clause. Also like the OSH Act, ERISA was intended to establish a "comprehensive legislative scheme," which "represents a careful balancing" and "policy choices," *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987), and was enacted to eliminate the "threat of conflicting or inconsistent State and local regulation . . . ." *Id.* at 46. *See also Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). Based on this intent, this Court has consistently construed ERISA's preemption clause broadly, giving effect to its "plain language." *Shaw*

proper role of state law with respect to OSHA-regulated conduct or conditions. Section 4 is the "savings clause" of the OSH Act. It provides that:

> Nothing in [OSHA] shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish . . . common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death . . . in the course of, employment.

29 U.S.C. § 653(b)(4). Under the plain meaning of the statute, Section 4 clearly is designed to preserve state workmen's compensation and other *private* civil tort (or contractual) actions. Although it makes clear that Congress did not intend the Act to have *any* effect on the "rights, duties or liabilities of *employers and employees*," the provision says nothing about actions undertaken by the state itself.

Section 18 addresses the preemptive effect of the Act on state-initiated actions. On an "issue with respect to which a Federal standard has been promulgated," which is this case, a state may only "assume responsibility for development and enforcement" of standards relating to such issues if a federally-approved state plan is in place. 29 U.S.C. § 667(b). Thus, the plain meaning of the OSH Act makes clear that Congress intended to preclude any state-initiated action regarding workplace safety—including "general" criminal prosecutions—unless undertaken pursuant to an approved state plan. No such plan exists and, therefore, under the express terms of Section

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v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *See also Pilot Life Insurance*, 481 U.S. at 46-47. Its savings clause, in contrast, has been construed narrowly, *id.* at 52; *Shaw*, 463 U.S. at 104, to save only those actions expressly enumerated. Following that approach in this case leads inexorably to the conclusion that the criminal prosecution is preempted by Section 18.

18 the enforcement action brought in the State of Illinois is preempted.

Second, even absent express preemption, OSHA is a paradigm of a federal effort to "preempt the field." The statute and its legislative history repeatedly reinforce the idea that *when there are federal standards in place*, those standards are intended to be the uniform and comprehensive standards (in the absence of an approved state plan). *See* 29 U.S.C. §§ 667(a) & (b); S. Rep. No. 91-1282 at 1-7, *reprinted in OSH Act Legis. Hist.* at 141-147. It is no answer to say, as the State does in this case, that Congress intended to preempt only the "field" of occupational safety and health "regulation" and not the "field" of "general criminal law." Here, the criminal charge is based upon breach of a "duty" to provide a safe workplace, *i.e.*, exposing employees to certain conditions or substances which are regulated by the OSH Act. Where, as here, OSHA has taken it upon itself to define the employers' duties, there can be no question that the state is operating within the "field" of exclusive regulation—regardless of what category or label the state uses to define its legal action. As the Appellate Court of Illinois correctly observed, the dispositive fact is that "[t]he conduct the State seeks to regulate here, . . . as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA." App. at 23.[10]

Finally, the Illinois Supreme Court's conclusion that no conflict exists between the criminal prosecution and

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[10] Thus, this case is dissimilar from *Massachusetts* v. *Morash*, 57 U.S.L.W. 4429 (1989), where this Court found that the conduct at issue was not conduct regulated under ERISA. The case also is readily distinguishable from *California* v. *ARC America Corp.*, where the court specifically found that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies" and where there was no conflict in the application of both state and federal remedial provisions to the same conduct. 57 U.S.L.W. 4425, 4427, 4428 (1989).

federal workplace regulation under the OSH Act is fatally flawed because it is not based on a consideration of the "full purposes and objectives" of the OSH Act and the potential effects of a state criminal prosecution in the area. The Illinois court's reliance on the OSH Act's "stated goal" "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b), is certainly accurate—as far as it goes. The problem is that the court below focused on that stated purpose to the exclusion of all of the other specific, substantive provisions of the Act. Congress did not stop with a simple assertion that its goal was to assure safe working conditions. It specifically provided that states were to exercise jurisdiction in only two circumstances: (1) where "no [federal] standard is in effect", and (2) where, under a federally-approved plan, the state has adopted standards at least as effective as promulgated under the OSH Act.

State prosecutions based on workplace conditions conflict with the federal law because the OSH Act mandates *uniform* development and enforcement of fair and *balanced* occupational safety and health standards, which are established pursuant to scientific standards and procedural protections. *Ad hoc* state prosecutions for conduct regulated by the OSH Act, such as the one endorsed by the court below, have resulted and will continue to result in the enforcement of *different* standards of occupational health and safety. Regardless of whether such *ad hoc* state standards are more "strict" or more "lenient," application of a different standard to conduct and conditions in compliance with OSHA standards conflicts with Congress' objective of creating uniform and balanced workplace safety standards.[11] *See supra* at 3-4.

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[11] The court below brushed aside the conflict created when the state enforces more stringent standards than OSHA's by stating that OSH Act standards were intended merely to establish a "na-

3. If the preemption ruling of the Illinois Supreme Court is left in place, the development of occupational health and safety standards in the manner Congress intended and provided for in the OSH Act will be severely undermined. Instead of experienced and knowledgeable federal officials setting uniform national workplace safety standards based on available scientific evidence, *see supra* at 4, an entire "secondary" level of "workplace standards" will be established by local prosecutors and juries, wholly uninformed (and, most likely, wholly unconcerned) with the economic and scientific complexities of workplace safety. Such local authorities will simply decide, without guidance, whether to deem a particular workplace environment "safe"—regardless of what standards the federal government, under OSHA, has established to regulate that environment.

Of course, these local "standards" will be established on a subjective and post-hoc basis, rather than on the basis of objective scientific criteria, as required under § 655(b)(5), thereby negating congressional efforts to ensure that employers and employees know what their rights and duties are. *See supra* at 3. This relegation of federal standards to a subordinate role could not be more clearly illustrated than by the State's successful contention that OSHA standards simply are irrelevant in this case.

In sum, the decision below invites localized and politicized decisionmaking on workplace standards, the very

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tionwide floor", app. at 10-11, and that state standards "more protective" of health and safety will further the OSH Act's "stated goal" of worker protection, app. at 14-15. That simply is an erroneous reading both of preemption principles, in general, and the OSH Act, in particular. As stated in the text, the OSH Act is a statute that deals not just with general workplace safety objectives, but specifically limits state authority to instances where no federal standard is in effect or where the state has adopted a federally-approved plan for enforcing workplace health and safety.

conditions that the OSH Act was designed to correct. Senator Saxbe may have described those conditions best:

> In some States it was political football. When the administration would change, inspectors would change. They were not always career people who were qualified. Many times they were local politicians who were offered a job without any real training in health and safety.

116 Cong. Rec. 36521 (Oct. 13, 1970), *reprinted in OSH Act Legis. Hist.* at 343. Under the decision below, local prosecutors will have discretion to use imprecise judgment as to workplace safety to indict an employer or even, in extreme cases, for purposes of political harassment. Moreover, it seems plain that Congress' intent to encourage employer cooperation will be thwarted if employers (such as petitioners) who comply with OSH Act standards become subject to local prosecution.

B.

Although prosecutions such as this one are a relatively recent phenomenon, this is by no means an isolated case.[12] This case is simply one of a substantial number in which local prosecutors have attempted to use state criminal prosecutions in an effort to "regulate" conduct or conditions otherwise exclusively regulated under the OSH Act. Not only does the sheer volume of reported cases indicate that the decision below involves an issue of federal law that is recurring and important, but the decisions in various jurisdictions have been inconsistent.

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[12] The first state conviction of a corporate officer for a workplace death occurred in Cook County, Illinois in 1985 in the case of *People* v. *O'Neil*, Nos. 83-11091, 84-5064 (Cook County Cir. Ct. June 15, 1985), *appeal pending*, App. Ct. Ill., Nos. 85-1853, 85-1854, 85-1855, 85-1952 and 85-1953, in connection with the death of an employee from cynanide fumes. *See The National Law Journal*, April 21, 1986, at 1, col. 1. The preemption question was not raised at trial, but was raised on appeal.

Thus, the fate of individual criminal defendants, such as petitioners, has depended on their place of residence or employment. Such a situation clearly warrants review by this Court.

At present, the holding below conflicts with decisions of courts in several states that have held that the OSH Act preempts prosecutions based on workplace conditions. In addition, the holding below conflicts with the Montana Supreme Court's interpretation of the preemptive effect of the OSH Act.[13]

In *People* v. *Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729 (1988), a supervisor was charged with involuntary manslaughter in connection with the death of an employee from carbon monoxide intoxication. The Michigan Court of Appeals held that the OSH Act preempted the prosecution on the ground that it "expressly provides for the adoption of federal standards of industrial safety. Although the states are permitted to exercise independent state action under certain circumstances, such jurisdiction is severely limited" to situations where there is no federal standard in effect or where there is a federally-approved state plan in effect. 425 N.W.2d at 732. The court noted that Michigan had such a plan but the prosecutions were not brought pursuant to it. Thus, the court held that the state was trying to circumvent the OSH Act and the penalties provided for under the Michigan plan, in direct conflict with § 667 "which specifically addresses a state's 'jurisdiction' with regard to occupational safety and health issues." *Id.* at 732. The Michigan Supreme Court has granted leave to appeal with respect to the limited issue of whether the OSH Act preempts the prosecution. 429 N.W.2d 593 (Mich. 1988).

[13] The Wisconsin Court of Appeals, like the Illinois Supreme Court, decided against preemption in *State* v. *Black*, 144 Wis.2d 745, 425 N.W.2d 21 (Wis. App. 1988), in which an officer and operator of a fireworks plant was convicted of homicide by reckless conduct following a fire and explosion that killed an employee.

In *Sabine Consolidated, Inc.* v. *Texas*, 756 S.W.2d 865 (Tex. Ct. App. 1988), a Texas construction company and its president were convicted of criminally negligent homicide in connection with the death of two employees when a trench they were working in collapsed. The Texas Court of Appeals reversed on the ground that the OSH Act preempted the prosecution. The court relied on Sections 667 and 653(b)(4) to hold that the OSH Act preempts the entire field of workplace safety regulation. It specifically found that Section 653(b)(4) does not "save" state criminal actions from preemption. *Id.* at 868. The court noted that while state criminal prosecutions "do not literally purport to establish worker safety standards . . . the practical effect" is to do so. *Id.* It expressed its concern that if a state were allowed to undertake such prosecutions, "an employer could meet OSHA standards but still be prosecuted by the State a result [which would be] inconsistent with OSHA's intent to establish uniform safety standards." *Id.* at 869.

In *Colorado* v. *Kelran Construction, Inc.*, 13 OSHC 1898 (Dist. Ct. Colo. Oct. 6, 1988), the defendant corporation was charged with criminally negligent homicide and the court dismissed the indictment on the ground that "Congress has expressly disallowed regulations other than OSHA's or those of a state properly approved by OSHA." *Id.* at 1899-1900. It found that application of general criminal laws in an OSH Act context constituted such prohibited regulation, stating that "[t]he Court cannot find that Congress intended [that] employers were required to meet the federal OSHA and OSHA approved state standards PLUS other standards imposed by local prosecutors, courts, and juries." *Id.* at 1899.[14]

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[14] Similarly, in *New York* v. *Pymm Thermometer Corp.*, No. 93086 (N.Y. Sup. Ct. Nov. 13, 1987), *appeal pending*, N.Y. App. Div., a New York thermometer manufacturer and its owners were found guilty by a jury of criminal assault and reckless endangerment for allowing workers to be exposed to what the jury believed

Finally, in *Thornock* v. *State*, 745 P.2d 324 (Mont. 1987), an employee injured by a sawmill conveyer brought a negligence action against the State of Montana based upon a state statutory duty to inspect hazardous workplaces and machinery. The Montana Supreme Court affirmed a grant of summary judgment against the employee on the ground that the OSH Act preempted the action. The court rejected the employee's argument that "OSHA was intended to preempt states from setting and enforcing their own standards as to worker safety but not as to inspections," *id.* at 326, on the ground that inspection is "part and parcel of the enforcement of standards" which "Congress has stated expressly that formulation and enforcement of work place safety will be a prerogative of OSHA," *id.* at 328. The court observed that "[i]t is plain from reading the Occupational Safety and Health Act that Congress intended to occupy the field of assuring worker safety" and noted that "to regain the right to set and enforce work safety rules" the state must enact and obtain federal approval of a state plan. *Id.*

Thus, the issue of OSH Act preemption is a recurring one which ultimately will have to be resolved by this Court. The number of criminal prosecutions in recent years compared to prior years demonstrates a marked trend toward greater use of state criminal laws to enforce workplace standards, which will only continue if left unchecked. Moreover, the stakes are high. Employers are subject to criminal prosecution for conduct and conditions which may, as in this case, comply with federal standards. State courts so far have been unable to resolve the issue in any consistent manner. Thus, employers and employees alike are provided no guidance as to their respective rights and responsibilities.

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to be unsafe levels of mercury fumes. However, following the entry of the jury verdict, the trial judge set aside the verdict on grounds of OSH Act preemption.

In the meantime, the integrity of the OSH Act is being eroded. State and local prosecutors are implementing and enforcing state "standards" without obtaining federal approval of a state plan, in direct contravention of Congress' intent. The confidence of employers and employees in the significance and effectiveness of OSH Act standards is undermined, especially in the case of prosecutions for conduct which complies with those federal standards. And the ability of the OSH Act's administrators to fulfill Congress' objective of uniform, predictable and effective national workplace safety standards is seriously compromised. Accordingly, this case presents precisely the type of issue that historically was subject to the mandatory jurisdiction of the Court, and that should be accepted for discretionary review now because of its fundamental importance, which transcends the specific facts of the case before the Court.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Respectfully submitted,

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May 3, 1989

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

Docket No. 65588—Agenda 12—March 1988.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

CHICAGO MAGNET WIRE CORPORATION *et al.*,
Appellees.

JUSTICE WARD delivered the opinion of the court:

The issue we consider on this appeal is whether the Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. § 651 *et seq.* (1982)) preempts the State from prosecuting the defendants, in the absence of approval from OSHA officials, for conduct which is regulated by OSHA occupational health and safety standards.

Indictments returned in the circuit court of Cook County charged the defendants, Chicago Magnet Wire Corporation, and five of its officers and agents, Anthony Jordan, Kevin Keane, Frank Asta, Gerald Colby and Allan Simon, with aggravated battery (Ill. Rev. Stat. 1985, ch. 38, pars. 12-4(a), (c)) and reckless conduct (Ill. Rev. Stat. 1985, ch. 38, par. 12-5). The individual defendants were also charged with conspiracy to commit aggravated battery (Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a)). In substance, the indictments alleged that the defendants knowingly and recklessly caused the injury of 42 employees by failing to provide for them necessary safety precautions in the workplace to avoid harmful

exposure to "poisonous and stupifying substances" used by the company in its manufacturing processes. On the defendants' motion, the trial court dismissed the charges, holding that OSHA has preempted the State from prosecuting the defendants for the conduct alleged in the indictments. The appellate court affirmed (157 Ill. App. 3d 797), and we granted the State's petition for leave to appeal under Supreme Court Rule 315 (107 Ill. 2d R. 315(a)).

Defendant Chicago Magnet Wire Corporation is an Illinois corporation whose principal business is the coating of wire with various substances and chemical compounds. Anthony Jordan, Kevin Keane, Allan Simon, Frank Asta and Gerald Colby are officers or managerial agents of the corporation.

The indictments charged that the defendants unreasonably exposed 42 employees to "poisonous and stupifying substances" in the workplace and prevented the employees from protecting themselves by "failing to provide necessary safety instructions and necessary safety equipment and sundry health monitoring systems." The indictments also alleged that the defendants improperly stored the substances, provided inadequate ventilation and maintained dangerously overheated working conditions.

Counts of the indictments charging the defendants with aggravated battery alleged that the defendants exposed the employees to the toxic substances with "the conscious awareness that a substantial probability existed that their acts would cause great bodily harm" in violation of section 12-4(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1985, ch. 38, par. 12-4(a)). Other counts charging the defendants with aggravated battery alleged that the defendants knowingly committed acts "with the awareness that a substantial probability existed" that their conduct would cause the employees to "take by deception [of the employer], for other than medical pur-

poses, poisonous and stupifying substances" in violation of section 12-4(c) (Ill. Rev. Stat. 1985, ch. 38, par. 12-4(c)). The defendants were charged with reckless conduct in that they exposed the employees to substances "in a reckless manner, which caused harm to and endangered * * * [their] bodily safety * * * by consciously disregarding a substantial and unjustifiable risk of harm * * * which constitute[s] a gross deviation from the standard of care which a reasonable person would exercise in this situation." (Ill. Rev. Stat. 1985, ch. 38, par. 12-5.) The conspiracy counts alleged that the individual defendants conspired with the intent to commit aggravated battery and charged that in furtherance of the conspiracy, the defendants committed certain overt acts. Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a).

The circuit court dismissed the indictments, holding that OSHA preempts the States from prosecuting employers for conduct which is governed by Federal occupational health and safety standards, unless the State has received approval from OSHA officials to administer its own occupational safety and health plan. The court stated that because the conduct of the defendants set out in the indictments was governed by OSHA occupational health and safety standards, and the State had not received approval from OSHA officials to administer its own plan, it could not prosecute the defendants for such conduct.

The extent to which State law is preempted by Federal legislation under the supremacy clause of the Constitution of the United States is essentially a question of congressional intendment. (See *Malone v. White Motor Corp.* (1978), 435 U.S. 497, 504, 55 L. Ed. 2d 443, 450, 98 S. Ct. 1185, 1190; *Retail Clerks International Association, Local 1625 v. Schermerhorn* (1963), 375 U.S. 96, 11 L. Ed. 2d 179, 84 S. Ct. 219.) Thus, if Congress, when acting within constitutional limits, explicitly mandates the preemption of State law within a stated situa-

tion, we need not proceed beyond the statutory language to determine that State law is preempted. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* (1983), 461 U.S. 190, 203, 75 L. Ed. 2d 752, 765, 103 S. Ct. 1713, 1722.) Even absent an express command by Congress to preempt State law in a particular area, preemptive intent may be inferred where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" (*Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 713, 85 L. Ed. 2d 714, 721, 105 S. Ct. 2371, 2375; *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152), or where the regulated field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152; *Hines v. Davidowitz* (1941), 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399). Congressional intent to preempt State law may also be inferred where " 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Fidelity Federal Savings & Loan Association v. de la Cuesta* (1982), 458 U.S. 141, 153, 73 L. Ed. 2d 664, 675, 102 S. Ct. 3014, 3022, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.

The declared purpose of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. § 651(b) (1982).) To this end, Congress gave the Secretary of Labor the authority "to set mandatory occupational safety and health standards" for the workplace and to secure compliance with those standards by imposing civil and crim-

inal sanctions for their violation. (See 29 U.S.C. § 651 (b)(3) (1982).) An "occupational health and safety standard" is defined as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (29 U.S.C. § 652 (8) (1982).) OSHA also imposes a duty on employers, separate and independent from specific standards set by the Secretary, to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (1982).

Congress also authorized the Secretary to conduct investigations and on-site inspections of workplaces and to institute enforcement proceedings for violations of OSHA standards. (See 29 U.S.C. §§ 657 through 659, 662 (1982).) For violations of specific OSHA standards or section 654(a), OSHA authorizes the imposition of civil fines ranging from $1,000 to $10,000 (29 U.S.C. §§ 666(a) through (c) (1982)). Criminal fines of $10,000 may be imposed for giving unauthorized advanced notification of an OSHA inspection or knowingly making false statements on any OSHA filing. (See 29 U.S.C. §§ 666(e), (f) (1982).) OSHA also provides for prison terms of up to six months for willful violations of OSHA standards that result in an employee's death. 29 U.S.C. § 666(e) 1982).

The defendants read section 18(a) of OSHA (29 U.S.C. § 667(a) (1982)) to mean that under it Congress explicitly provided that the States are preempted from asserting jurisdiction over any occupational health and safety issue that is governed by OSHA occupational health and safety standards unless the State obtains approval from OSHA officials to administer its own occupational health and safety plan under section 18(b). Section 18 provides:

> "(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement." 29 U.S.C. § 667 (1982).

The defendants state that the conduct alleged in the indictments is governed by OSHA occupational health and safety standards. Specifically, they claim that OSHA standards define permissible exposure limits for the toxic substances which allegedly injured their employees and that OSHA also regulates the conduct that the prosecution says rendered the company's workplace unsafe. The defendants contend that therefore the trial court correctly held that, because the State had not received approval from OSHA officials pursuant to section 18(b) to prosecute the conduct set out in the indictments, the charges must be dismissed. We disagree.

Contrary to this argument, we cannot say that the language of section 18 of OSHA can reasonably be construed as explicitly preempting the enforcement of the criminal law of the States as to conduct governed by OSHA occupational health and safety standards. The language of section 18 refers only to a State's development and enforcement of "occupational health and safety standards." (29 U.S.C. § 667(a) (1982).) Nowhere in section 18 is there a statement or suggestion that the enforcement of State criminal law as to federally regulated workplace matters is preempted unless approval is obtained from OSHA officials.

The defendants argue, however, that because the charges set out in the indictments are based on conduct related to an alleged failure to maintain a safe work environment for their employees, in practical effect, the State is attempting to enforce occupational health and safety standards. They contend that the primary purpose of punishing conduct under criminal law is to deter conduct that society deems harmful and to secure conformity with acceptable norms of behavior. In that way, the criminal law establishes standards of care in society. When applied to conduct in the workplace, the defendants argue, criminal law serves the same purpose as OSHA, *i.e.*, to compel adherence to a particular standard of safety that will minimize the risk of injury.

It is the defendants' contention that in enacting OSHA, Congress intended to preempt all State laws to the extent they regulate workplace safety. They cite regulations promulgated by the Secretary which they say so interpret OSHA. Specifically, they note that section 1901.2 provides:

> "Section 18(a) of [OSHA] is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue to which a Federal standard has been issued." 29 C.F.R. § 1901.2 (1986).

They cite too this regulation promulgated by the Secretary:

> "[OSHA's preemption provisions] apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law appears to be 'at least as effective as' the Federal standard." Hazard Communication Standard, 52 Fed. Reg. 31,852, 31,860 (1987).

We cannot accept the defendants' contention that it must be concluded that Congress intended to preempt the enforcement of State criminal laws in regard to conduct of employers in the workplace because the State criminal

laws implicitly enforce occupational health and safety standards.

Although the imposition of sanctions under State penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law. For example, it also serves to punish as a matter of retributive justice. Too, whereas OSHA standards apply only to specific hazards in the workplace, criminal law reaches to regulate conduct in society in general. In contrast, occupational health and safety standards are promulgated under OSHA primarily as a means of regulating conduct to prevent injuries in the workplace.

It is to be observed also that for the most part OSHA imposes strict liability for violation of its standards, and that the criminal charges here allege that the defendants knowingly or recklessly injured several of their employees by unreasonably exposing them to toxic substances in the workplace. In order to be convicted of the charges, the State must establish that the defendants not only committed acts causing injury but that they also had the charged mental state, *i.e.*, that they recognized the risk of injury and nevertheless wilfully failed to take precautions to prevent injury. Thus, the criminal charges here do not set any new or other standards for workplace safety but rather seek to impose an additional sanction for an employer's conduct that, if proved, would certainly violate the duty set out in section 654(a) of OSHA (29 U.S.C. § 654(a) (1982)).

There is nothing in the structure of OSHA or its legislative history which indicates that Congress intended to preempt the enforcement of State criminal law prohibiting conduct of employers that is also governed by OSHA safety standards. We would observe that the Supreme Court declared in *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 2d 604, 614, 97 S. Ct. 1305, 1309, that "[w]here * * * the field which Congress is said

to have pre-empted has been traditionally occupied by the States, * * * 'we start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" See also *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 715, 85 L. Ed. 2d 714, 722-23, 105 S. Ct. 2371, 2376; *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 244, 3 L. Ed. 2d 775, 782, 79 S. Ct. 773, 779.

Certainly, the power to prosecute criminal conduct has traditionally been regarded as properly within the scope of State superintendence. (See *Knapp v. Schweitzer* (1985), 357 U.S. 371, 375, 2 L. Ed. 2d 1393, 1398, 78 S. Ct. 1302, 1305; *Patterson v. New York* (1977), 432 U.S. 197, 201, 53 L. Ed. 2d 281, 287, 97 S. Ct. 2319, 2322. The regulation of health and safety has also been considered as "primarily, and historically" a matter of local concern. (See *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 719, 85 L. Ed. 2d 714, 725, 105 S. Ct. 2371, 2378.) It cannot be said that it was the "clear and manifest" purpose of Congress to preempt the application of State criminal laws for culpable conduct of employers simply because the same conduct is also governed by OSHA occupational health and safety standards.

Although the provisions of OSHA are comprehensive, that Congress, in section 18, invited the States to administer their own occupational health and safety plans demonstrates that it did not intend to preclude supplementary State regulation. Indeed, section 651 of OSHA (29 U.S.C. § 651 (1982)) provides that the States are "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." It seems clear that the Federal interest in occupational health and safety was not to be exclusive.

Too, considering that until the recently increased interest in environmental safety charges were rarely

brought under State law for conduct relating to an employer's failure to maintain a safe workplace, it would be unreasonable to say that Congress considered the preemption of State criminal law when enacting OSHA. (See *Pratico v. Portland Terminal Co.* (1st Cir. 1985), 783 F.2d 255, 266 ("Our review of the legislative history of OSHA suggests that it is highly unlikely that Congress considered the interaction of OSHA regulations with other common law and stautory schemes other than worker's compensation").) Indeed, OSHA provides principally civil sanctions and only a few minor criminal sanctions for violations of its standards. Even for wilful violations of OSHA standards which result in an employee's death an employer can be sentenced only to a maximum of six months' imprisonment. There is no penalty provided for conduct which causes serious injury to workers. It seems clear that providing for appropriate criminal sanctions in cases of egregious conduct causing serious or fatal injuries to employees was not considered. Under these circumstances, it is totally unreasonable to conclude that Congress intended that OSHA's penalties would be the only sanctions available for wrongful conduct which threatens or results in serious physical injury or death to workers.

We judge that the purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. (See *United Airlines, Inc. v. Occupational Safety & Health Appeals Board* (1982), 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387.) It was not fear that the States would apply more stringent standards or penalties than OSHA that concerned Congress but that the States would apply lesser ones which would not provide the necessary level of safety. The comment has been made: "Congress * * * sought uniform national standards not to facilitate commerce but to prevent the 'race for the bottom' that occurred when each state sets its own standards. Congress favored a federal

law 'so that those states providing vigorous protection would not be disadvantaged by those that did not.'" (See Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 550 (1987).) While additional sanctions imposed through State criminal law enforcement for conduct also governed by OSHA safety standards may incidentally serve as a regulation for workplace safety, there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of State criminal law simply because of its incidental regulatory effect.

A question with resemblance to the one here was before the Supreme Court in *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615. There, the Court addressed the issue of whether State courts are preempted under the Atomic Energy Act from assessing punitive damages against defendants that cause injuries by excessive radiation. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* (1983), 461 U.S. 190, 205, 75 L. Ed. 2d 752, 765, 103 S. Ct. 1713, 1722, the Court had held that under the Atomic Energy Act the States are precluded from regulating the safety aspects of nuclear energy. The defendant argued that a "State-sanctioned award of punitive damages * * * punishes and deters conduct relating to radiation hazards" and therefore should be preempted by the Atomic Energy Act. The Court upheld the award notwithstanding the fact that it would have an incidental regulatory effect, stating:

> "In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that

> safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." *Silkwood*, 464 U.S. 238, 256, 78 L. Ed. 2d 443, 457, 104 S. Ct. 615, 625.

We note, too, that Congress expressly stated that OSHA was not intended to preempt two bases of liability that, like criminal law, operate to regulate workplace conduct and implicitly set safety standards—State workers' compensation and tort law. Section 4(b)(4) of OSHA provides:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4) (1982).

There is little if any difference in the regulatory effect of punitive damages in tort and criminal penalties under the criminal law. (See Restatement (Second) of Torts § 908, comment *b* (1970).) We see no reason, therefore, why what the Court declared in *Silkwood* should not be applied to the preemptive effect of OSHA. Also, if Congress, in OSHA, explicitly declared it was willing to

accept the incidental regulation imposed by compensatory damages awards under State tort law, it cannot plausibly be argued that it also intended to preempt State criminal law because of its incidental regulatory effect on workplace safety.

It is a contention of the defendants that it is irrelevant that the State is invoking criminal law jurisdiction as long as the conduct charged in an indictment or information is conduct subject to regulation by OSHA. The defendants argue that the test of preemption is whether the conduct for which the State seeks to prosecute is in any way regulated by Federal legislation. The defendants assert that because the conduct charged in the indictments is conduct regulated under OSHA, a State prosecution for that conduct is preempted by OSHA. The contention is not convincing.

Simply because the conduct sought to be regulated in a sense under State criminal law is identical to that conduct made subject to Federal regulation does not result in State law being preempted. When there is no intent shown on the part of Congress to preempt the operation of State law, the "inquiry is whether 'there exists an irreconcilable conflict between the federal and state regulatory schemes.'" (*Rice v. Norman Williams Co.* (1982), 458 U.S. 654, 659, 73 L. Ed. 2d 1042, 1049, 102 S. Ct. 3294, 3298-99; *Huron Portland Cement Co. v. City of Detroit* (1960), 362 U.S. 440, 443, 4 L. Ed. 2d 852, 856, 80 S. Ct. 813, 815; *Amalgamated Association of Street, Electric Ry. & Motor Coach Employees of America v. Lockridge* (1971), 403 U.S. 274, 285-86, 29 L. Ed. 2d 473, 482, 91 S. Ct. 1909, 1917.) A conflict arises where "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210, 1217), or when State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"

(*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 2d 581, 587, 61 S. Ct. 399, 404.

The defendants argue that the prosecutions here would conflict with the purposes of OSHA. They say that Congress intended that under OSHA the Federal government was to have exclusive authority to set occupational health and safety standards. The standards were to be set only after extensive research to assure that the standards would minimize injuries in the workplace but at the same time not be so stringent that compliance would not be economically feasible. (See 29 U.S.C. § 655(b)(5) (1982).) The defendants correctly point out that although the States are given the opportunity to enforce their own occupational health and safety standards, the plan submitted must contain assurances that the State will develop and enforce standards "at least as effective" as OSHA's. (See 29 U.S.C. § 667 (1982).) Even after a State plan is approved, the Occupational Safety and Health Administration retains jurisdiction to enforce its own standards until it determines, based on three years of experience, that the State's administration of the plan is "at least as effective" as OSHA's. 29 U.S.C. § 667 (1982).

The defendants maintain that Federal supervision over State efforts to enforce their own workplace health and safety programs would be thwarted if a State, without prior approval from OSHA officials, could enforce its criminal laws for workplace conduct of employers which is also subject to OSHA standards. They say that the States would thus be permitted to impose standards so burdensome as to exceed the bounds of feasibility or so vague as not to provide clear guidance to employers.

We believe the concern of the defendants is unfounded. We cannot see that State prosecutions of employers for conduct which is regulated by OSHA standards would conflict with the administration of OSHA or be at odds with its goals or purposes. On the contrary, prosecutions of employers who violate State criminal law by failing to main-

tain safe working conditions for their employees will surely further OSHA's stated goal of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." (29 U.S.C. § 651 (b) (1982).) State criminal law can provide valuable and forceful supplement to insure that workers are more adequately protected and that particular egregious conduct receives appropriate punishment.

The defendants' statements that the State will now have the ability to enforce more stringent standards than OSHA's does not persuade. As stated, the charges here are based on the defendants' alleged willful failure to remove workplace hazards which create a substantial probability that they will cause injuries to their employees. Thus, employers are not left without guidance as to what standard of care they must meet. Too, in practical terms, if a defendant were in compliance with OSHA standards it is unlikely that the State would bring prosecutive action. Enforcement of State criminal law in the workplace will not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404.

To adopt the defendants' interpretation of OSHA would, in effect, convert the statute, which was enacted to create a safe work environment for the nation's workers, into a grant of immunity for employers responsible for serious injuries or deaths of employees. We are sure that that would be a consequence unforeseen by Congress.

The question here has been considered by a few courts. The appellate court of Wisconsin in *State ex rel. Cornellies v. Black* (Wis. App. 1988), 144 Wis. 2d 745, 425 N.W.2d 21, held that the State's authority to enforce its criminal laws in the workplace has not been preempted by OSHA. The court stated:

> "There is nothing in OSHA which we believe indicates a compelling congressional direction that Wis-

> consin, or any other state, may not enforce its homicide laws in the workplace. Nor do we see any conflict between the act and sec. 940.06, Stats. To the contrary, compliance with federal safety and health regulations is consistent, we believe, with the discharge of the state's duty to protect the lives of employees, and all other citizens, through enforcement of its criminal laws. Wisconsin is not attempting to impose a penalty for violation of any safety regulations. It is only attempting to impose the sanctions of the criminal code upon one who allegedly caused the death of another person by reckless conduct. And the fact that that conduct may in some respects violate OSHA safety regulations does not abridge the state's historic power to prosecute crimes." (144 Wis. 2d at 755, 425 N.W.2d at 25.)

(A divided court held to the contrary in *People v. Hegedus* (1988), 169 Mich. App. 62, 425 N.W.2d 729, *leave to appeal granted in part* (1988), 431 Mich. 870, 429 N.W. 2d 598, citing the opinion of our appellate court in this case (157 Ill. App. 3d 797), also held *contra.*)

We would note that on September 27, 1988, the congressional committee on government operations approved and adopted a report on the question of whether State criminal prosecutions for workplace safety violations are preempted by OSHA. The committee concluded that inadequate use has been made of the criminal penalty provisions of the Act and recommended to Congress that "OSHA should take the position that the States have clear authority under the Federal OSH Act, as it is written, to prosecute employers for acts against their employees which constitute crimes under State law." Report of House Comm. on Government Operations, Getting Away with Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations, H.R. Rep. No. 1051, 100th Cong., 2d Sess. 9 (1988).

The People as supplemental authority cite a letter from the Department of Justice to the chairman of the

committee. The letter of the Department of Justice, responding to the report, states in part that the Department shared the concerns of the committee as to the adequacy of the statutory criminal penalties provided for violations of OSHA and also observes:

> "As for the narrower issue as to whether the criminal penalty provisions of the OSH Act were intended to preempt criminal law enforcement in the workplace and preclude the States from enforcing against employers the criminal laws of general application, such as murder, manslaughter, and assault, it is our view that no such general preemption was intended by Congress. As a general matter, we see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability."

The defendants offered supplemental authorities also, arguing that the Department's view was not entitled to deference and was not binding on a court. It, of course, does not bind a court and, whether entitled to deference or not, it is certainly not inappropriate to note that the view of the governmental department charged with the enforcement of OSHA is also the view of this court.

In view of our holding that the State is not preempted from conducting prosecutions, we need not address the defendants' motion to strike portions of the State's brief and certain grand jury testimony.

For the reasons given, the judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court of Cook County for further proceedings.

Judgments reversed;
cause remanded.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

86-0014

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

CHICAGO MAGNET WIRE CORPORATION, an Illinois corporation, ANTHONY JORDAN, KEVIN KEANE, GERALD COLBY, ALLAN SIMON and FRANK ASTA,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable Earl E. Strayhorn, Judge Presiding

JUSTICE O'CONNOR delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County dismissing various indictments and information against Chicago Magnet Wire Corporation (CMW), and five corporate officials, Anthony Jordan, Kevin Keane, Gerald Colby, Allan Simon, and Frank Asta. The sole issue on appeal is whether state criminal prosecutions based on conditions in the workplace are preempted by the Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. § 651 *et seq.* (1982).) We affirm.

On June 26, 1985, the Grand Jury of Cook County voted indictments against CMW and five of its corporate

officials, charging each with multiple counts of aggravated battery and reckless conduct pursuant to Ill. Rev. Stat. 1985, ch. 38, pars. 12-4(a) and (c) and 12-5 and with violating the conspiracy statute. Ill Rev. Stat. 1985, ch. 38, par. 8-2(a).

One set of aggravated battery indictments, charging a violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-4(a), alleged that CMW and the individual defendants, while acting in their official capacity, exposed the named employees to numerous federally regulated substances in the workplace; failed to provide necessary safety instructions and equipment and health monitoring systems in the workplace; provided inadequate ventilation in the workplace and maintained dangerously overheated working conditions while the employees were exposed to the federally regulated substances. It was alleged that as a consequence of these acts, defendants violated their duty to provide a safe workplace for employees and caused great bodily harm to the named employees with the conscious awareness that a substantial probability existed that their acts would cause great bodily harm.

The second set of aggravated battery indictments alleged that CMW and the individual defendants knowingly committed acts which would cause named employees to take by deception and for other than medical purposes federally regulated substances and that such acts harmed the employees in violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-4(c).

The reckless conduct charges alleged that defendants, in conducting the business of coating wire, grossly deviated from the standard of care which a reasonable employer would exercise in the same situation and thereby violated their duty to provide a safe workplace in violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-5.

The conspiracy indictment charged both CMW and the individual defendants with conspiring against the

named employees with the intent to commit aggravated battery in violation of Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a).

Defendants filed a joint motion to dismiss and on December 13, 1985, the court dismissed all charges against them, finding that OSHA preempted Illinois from applying Illinois criminal law to conduct involving federally regulated occupational safety and health issues within the workplace. The State filed various informations which were dismissed on the same basis and this appeal followed.

The State contends that the indictments should be reinstated as the prosecutions were undertaken in pursuance of the state's police power which was neither expressly nor impliedly preempted by Congress. The defendants contend that the criminal charges are expressly preempted by OSHA and that the dismissal of the charges should be affirmed.

State laws are preempted when Congress has declared its intent, either explicitly or implicitly, to occupy a certain area of law. (*Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 248, 78 L.Ed. 2d 443, 104 S. Ct. 615; *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305.) Where preemptive intent is not expressly stated in the statute, the intent of Congress must be derived from the statutory language, from the comprehensiveness of the regulatory scheme, from the legislative history of the statute, or from the fact that the Federal and State statutes at issue conflict. (See *Hillsborough County, Florida v. Automated Medical Laboratories* (1985), —— U.S. ——, 85 L.Ed. 2d 714, 105 S. Ct. 2371.) In our view, the comprehensiveness of the Occupational Safety and Health Act, in conjunction with the fact that the states have been afforded the opportunity to develop their own regulatory schemes, evidences a Congressional intent to preempt the State from applying its criminal statutes to

conditions in the workplace that are specifically regulated by OSHA.

Congress enacted OSHA in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. sec. 651(b) (1982).) Section 655 of the Act expressly provides for the adoption of Federal standards of industrial safety, and while the Federal standards are given primacy under the statute, the states are permitted to exercise independent state action under certain circumstances.

A State agency may assert jurisdiction over an occupational safety or health issue if there is no Federal standard in effect (29 U.S.C. sec. 667 (a)), or a State may submit its own enforcement plan to the United States Secretary of Labor for approval pursuant to 29 U.S.C. sec. 667(b). In the absence of a State plan which has been approved by the Secretary of Labor, State laws related to working conditions regulated by OSHA are preempted.

The preemptive effect of section 667(b) was recognized by the Illinois Supreme Court in *Stanislawski v. Industrial Commission* (1983), 99 Ill. 2d 36, 39-40, 457 N.E. 2d 399, in which the court stated that under OSHA, "the only method by which a State may assume responsibility for development and enforcement of safety and health standards with respect to which Federal standards have been adopted" is through an approved State plan under the Act. (See also *United Air Lines, Inc. v. Occupational Safety & Health Appeals Board* (1982), 32 Cal. 3d 762, 772, 654 P.2d 157 (a State is preempted from regulating matters governed by OSHA standards in the absence of the adoption of a federally approved State plan); *Five Migrant Farmworkers v. Hoffman* (1975), 136 N.J. Super. 242, 247, 345 A.2d 378, (OSHA supersedes all State laws with respect to general working conditions).)

Illinois submitted a State plan, but it was withdrawn on June 30, 1975. (See *Stanislawski v. Industrial Commission* (1983), 99 Ill. 2d 36, 39, 457 N.E.2d 399.) The State's position, however, is that it was under no obligation to comply with section 667(b) by developing a State plan in order to prosecute defendants under State criminal laws. The State argues that the preemptive effect of sections 667(a) and (b) is limited to State administrative schemes, such as the one at issue in *Stanislawski*, which duplicate OSHA's regulation of health and safety standards, but that it was not intended to extend to state criminal laws as they might apply in the workplace.

The main thrust of the State's argument is that the prosecutions at issue here are not preempted because they are based on the application of general criminal laws rather than on the enforcement of specific workplace health and safety regulations. To support its assertion that Congress explicitly intended to leave preexisting State criminal laws undisturbed, the state cites section 653(b)(4) of the Act which provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. 29 U.S.C. § 653(b)(4) (1982).

In our view, this section of the Act does not permit the State to prosecute conduct or conditions in the workplace under State criminal laws in so far as the conduct or conditions are regulated by OSHA. The courts which have interpreted section 653(b)(4) have consistently found that the purpose of this section was to preserve the existing private rights of injured employees relative to workman's compensation, State tort law, and other

common law remedies against employers but not to create any additional civil remedies in favor of employees. See, *e.g*, *Johnson v. Koppers Co. Inc.* (N.D.Ohio 1981), 524 F.Supp. 1182, 1189, *appeal dismissed* (6th Cir. 1982), 705 F.2d 454; *United Steelworkers of America v. Marshall* (D.C. Cir. 1980), 647 F.2d 1189, 1235-36, *cert. denied* (1981), 453 U.S. 913; *Berardi v. Getty Refining & Marketing Co.* (1980), 435 N.Y.S.2d 212, 215-216, 107 Misc. 2d 451.

The determinative factor is not whether the State is seeking to enforce a criminal law of general application rather than specific workplace health and safety regulations but what conduct the state is seeking to regulate. (See *NDK Corp. v. Local 1550 of the United Food and Commercial Workers International Union* (1984), 128 Ill. App. 3d 207, 470 N.E.2d 565.) The State would not be foreclosed from applying its criminal laws in the workplace if the prosecutions charged the defendants with crimes not involving working conditions. The conduct the State seeks to regulate here, however, as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA. We therefore believe that the trial court properly found that the prosecutions were preempted.

The State's reliance on *Silkwood v. Kerr-McGee Corp.* (1984), 464 US. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615, is misplaced. In *Silkwood*, the Supreme Court reversed a Court of Appeals decision which held that the Atomic Energy Act, and the Nuclear Regulatory Commission established by it, preempted State law and precluded an award of punitive damages for injuries caused by exposure to radiation. The Supreme Court held that the award of punitive damages under State tort law was not preempted in that allowing a plaintiff to recover for injuries caused by nuclear hazards was not inconsistent with the Federal regulatory scheme developed by the Nuclear Regulatory Commission. *Silkwood v. Kerr-McGee*

Corp. (1984), 464 U.S. 239, 257-58, 78 L.Ed.2d 443, 104 S.Ct. 615.

Silkwood was decided under the Atomic Energy Act, to which OSHA does not apply. In addition, the Court in *Silkwood* distinguished between "state regulation of the safety aspects of nuclear energy," which was held preempted, and State law to compensate injured persons, which the Court held was not preempted. Here, although the State characterizes its purpose as punitive and deterrent and therefore permissible under *Silkwood*, in fact it seeks to regulate occupational safety and health through the application of criminal laws, which is impermissible under section 18(b) of OSHA. 29 U.S.C. § 667(b) (1982).

The State has expressed valid and legitimate concerns about the consequences of preemption on its ability to control the activities of employers. But Congress has evidenced an intent that criminal sanctions should not be imposed for activities involving workplace health and safety except in highly limited circumstances, and that health and safety requirements should be established through standard-setting, which provides employers with clear and detailed notice of their legal obligations. Illinois' view that employers may be held criminally liable for workplace injuries or illness, regardless of their compliance with OSHA standards, would lead to piecemeal and inconsistent prosecutions of regulatory violations throughout the states, a result that Congress sought to preclude in enacting OSHA.

For the foregoing reasons, we affirm the decision of the circuit court of Cook County dismissing the indictments against Chicago Magnet Wire and its corporate officers.

Judgment affirmed.

CAMPBELL and BUCKLEY, J.J., concur.

APPENDIX C

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

Indictment Nos. 85 7741, 77
7743, 77
7745, 77
7747

Charge: Aggravated Battery

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

CHICAGO MAGNET WIRE CORP.,
ANTHONY JORDAN, KEVIN KEANE, GERALD COLBY,
ALLAN SIMON, FRANK ASTA

Before JUDGE EARL E. STRAYH

December 13, 1985

Court convened pursuant to adjournment.

PRESENT:

HON. RICHARD M. DALEY
State's Attorney of Cook County

by Mr. Glen C. Sechen and
Ms. Lynn Worlay
Assistant State's Attorneys
appeared on behalf of the People;

Mr. Patrick Tuite
appeared on behalf of Kevin Keane,

Mr. George Catsirilas and
Mr. Robert Stevenson
appeared on behalf of Chicago Magnet Corp.,

Mr. Harvey Silets
appeared on behalf of Anthony Jordan

Mr. William J. Martin
appeared on behalf of Gerald Colby,
Al Simon and Frank Asta.

CLERK: State of Illinois versus Chicago Magnet Wire Corp.

MS. WORLAY: Good morning, Lynn Worlay, Assistant State's Attorney.

MR. TUITE: I'm Patrick Tuite on behalf of Mr. Kevin Keane, who is present in Court.

MR. CATSIRILAS: George Catsirilas and Robert Stevenson on behalf of Chicago Magnet Wire Corp.

MR. SILETS: Harvey Silets on behalf of Anthony Jordan.

MR. MARTIN: William J. Martin on behalf of Mr. Colby, Asta, and Simon.

THE COURT: Either side have anything else they wish to offer over and above what has already been presented?

MR. SECHEN: No, sir, we do not, other than reminding the Court of the motions that we made with respect to amending, and motion to strike the affidavit.

THE COURT: Motion to strike the affidavit is denied.

MR. SECHEN: Thank you, Judge.

THE COURT: Motion to amend—what was that motion to amend?

MR. SECHEN: The clerical error in the indictment with respect—

THE COURT: Allowed.

MR. SECHEN: Thank you.

THE COURT: All right.

I'll render my ruling on the motion to dismiss.

The extended December, 1984 Grand Jury of Cook County has indicted the defendants, corporation, individual corporate officers and management persons in seven indictments, each with multiple counts alleging aggravated battery, wreckless conduct, and conspiracy to commit aggravated battery.

The foundational under, pending all of the charges is that the defendants corporation is charged, officers and named managers in conducting their business, to-wit, a manufacturing plant, which engaged in the business of coating wire with various chemical compounds, and while under the duty to provide a safe work place, and with an awareness that a substantial probability existed which would cause employees of the defendants business to, "take by deception for other than medical purposes, poisonous and stupifying substances, to-wit, substances including not but not limited to: Trichloroethylene, xylene, cresol, phenol, n-methyl-2-tyrrolidon, 4-methyl-2-tenpon ketone, urethane, polyvinyl chloride, toluene diisocyana aluminum dust, copper dust and naphta—that's all over with, to their employees—to their employees.

It is alleged that defendants employees were harmed by exposing them to poisonous and stupifying substances by way of inhallation and skin absorption and by failing to provide necessary safety instructions, safety equipment, and by maintaining an unsafe work place.

The defendants are alleged to have acted knowingly and wilfully.

The defendants have filed consolidated motions to dismiss all charges, asserting that: 1, Federal Law preempts the application of State law to questions arising out of issues of work place safety, where Federal standards have been set.

2, the charges do not state indictable offenses.

3, the conspiracy and aggravated battery Statutes, as applied to defendants', alleged conduct, violate their due process rights.

4, there was insufficient evidence adduced before the Grand Jury to support the return of the indictment.

The parties have each submitted memoranda of opinion and authority in supoprt of their respective motions.

And in addition, the Court has heard each side in oral arguments.

The Court finds, it has jurisdiction over the parties and of the subject matter.

With respect to their assertion of Federal preemption, the defendants' motion raises questions of Federal Constitutional import. They allege that the action of the prosecution in securing the return of these indictments, constitutes, "the indiscriminate and arbitrary prosecution of Illinois corporations and corporate officials for conduct arising from a Federally regulated industrial work environment."

The prosecution disputes this contention, saying, the crimes herein charged, are not regulatory in nature, but malum inse. Malum, M-A-L-U-M I-N-S-E, two words. And are, therefore, outside the pale of Federal regulation and clearly permissible under a State's right to exercise its police powers, to frame the issue more clearly.

The questions presented by this case can be stated thusly: 1, can a State regulate the operation of a work place where the Federal Government has undertaken to legislate in this area?

2, can a State assert criminal jurisdiction over individuals within its borders for inducing work related injuries through conduct in the industrial work environment, although, such conduct is in accord with Federally mandated work place standards?

Federal preemption has its Genesis in Article 6, Clause 2 of the United State's Constitution, which states: "This Constitution and the laws of the United States, which shall be made in pursuance, thereof, and all safety made

or which shall be made under the authority of the United States shall be the Supreme Law of the lands, and the Judges in every State shall be bound. Thereby, anything in the Constitution or Laws of any State to the contrary, notwithstanding."

Semi-final question to be decided in a determination of preemption is congenial intent, where Congress through expressed intent, sets forth in the Statute, asserts an intention to legislate in a particular area and establish standards, preemption occurs.

In 1970, Congress enacted the Occupational Safety and Health Act. The purpose of the act was to insure healthful and safe conditions in the industrial work places in our country.

The Statute requires among other things, that the United States Secretary of Labor establish health standards concerning the use of toxic materials or harmful physical agents on the industrial work floor.

The Statute also provides for Civil and Criminal penalties for intentional violations of safety and health rules.

Congress further limited State action in the area of occupational health and safety to severely restricted areas, that is, where no Federal standard is established. With respect to any occupational health issue a State may assert jurisdiction over that issue.

However, the Federal standards have been set. A State is precluded from exerting jurisdiction over the issue, unless it has been submitted and had approved by the United States Secretary of Labor, an enforcement plan.

Illinois has not had approved any State enforcement plan respecting toxic materials or harmful substances.

As to the doctrine of preemption, which is a well recognized principle in Federal Law, our State Supreme Court has spoken.

In Stanislowski versus the Industrial Commission, 88 Illinois, 2nd, 36, 457 Northeast, 2nd, 388, decided in 1973.

The Illinois Industrial Commission in denying an award, ruled, "by reason of the enactment of the Occupational Safety and Health Act, all States' enforcement of industrial safety laws, is preempted."

In affirming the commission, our Illinois Supreme Court through Mr. Justice Goldenhirst, stated, and I quote: In view of our holding that the adoption of standards was preempted, and that no plan was adopted under which the State would assume jurisdiction, there was no standard in force and effect, the commission correctly held that the matter was preempted."

OSHA having set standards governing the use of toxic materials and harmful substances in the work place and Illinois being bereaved of any approved standards in this area, People of the State of Illinois are precluded from exercising Criminal jurisdiction over defendants in the manner attempted here under, under the reciprocity clause of the United States Constitution.

And defendant's motion to quash each of these indictments is—and the same, is hereby sustained.

Having ruled on this matter, on the basis of Federal preemption, the Court expresses no opinion regarding the issue of due process, or the sufficiency of the indictments to state a cause of action or prosecutorial misconduct. Other matters which were asserted by the defendants as being a basis for a motion to dismiss.

The defendants are, hereby, discharged, and their bond is exonerated.

APPENDIX D

Ill. Rev. Stat. ch. 38, § 8-2. Conspiracy

(a) Elements of the offense. A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

(b) Co-conspirators.

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or

(2) Has been convicted of a different offense, or

(3) Is not amenable to justice, or

(4) Has been acquitted, or

(5) Lacked the capacity to commit an offense.

(c) Penalty.

A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy, except that if the object is an offense prohibited by Sections 11-15, 11-16, 11-17, 11-19, 24-1(a)(1), 24-1(a)(7), 28-1, 28-3 and 28-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended or prohibited by Sections 401, 402, 403, 404, 406(b) or 407 of the "Illinois Controlled Substances Act", enacted by the 77th General Assembly,[1] or an inchoate offense related to any of the aforesaid principal offenses the person convicted may be imprisoned not to exceed 10 years: Provided, however, that no penalty for conspiracy to commit treason, murder, or

aggravated kidnapping shall exceed imprisonment for 20 years, and no penalty for conspiracy to commit any offense other than those specified in this subsection shall exceed imprisonment for 5 years. Laws 1961, p. 1983, § 8-2, eff. Jan. 1, 1962. Amended by Laws 1965, p. 406, § 1, eff. July 1, 1965; P.A. 77-772, § 1.

Ill. Rev. Stat. ch. 38, § 12-4. Aggravated Battery

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

(b) A person who, in committing a battery either:

(1) Uses a deadly weapon;

(2) Is hooded, robed or masked, in such manner as to conceal his identity;

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes;

(4) Knows the individual harmed to be a supervisor, director, instructor or other person employed in any park district and such supervisor, director, instructor or other employee is upon the grounds of the park or gounds adjacent thereto, or is in any part of a building used for park purposes;

(5) Knows the individual harmed to be a caseworker or other person employed by the State Department of Public Aid or a County Department of Public Aid and such caseworker, investigator, or other person is upon the grounds of a Public Aid office or grounds adjacent thereto, or is in any part of a building used for Public Aid purposes, or upon the grounds of a home of a public aid applicant, recipient, or any other person being inter-

viewed or investigated in the employee's discharge of his duties, or on grounds adjacent thereto, or is in any part of a building in which the applicant, recipient, or other such person resides or is located;

(6) Knows the individual harmed to be a peace officer, or a person summoned and directed by him, or a correctional officer, while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest;

(7) Knows the individual harmed to be a fireman engaged in the execution of any of his official duties;

(8) Is, or the person battered is, on or about a public way, public property or public place of accommodation or amusement; or

(9) Knows the individual harmed to be the driver, operator, employee or passenger of any transportation facility or system engaged in the business of transportation of the public for hire and the individual assaulted is then performing in such capacity or then using such public transportation as a passenger or using any area of any description designated by the transportation facility or system as a vehicle boarding, departure, or transfer location commits aggravated battery.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic or anesthetic substance commits aggravated battery.

(d) Sentence.

Aggravated battery is a Class 3 felony.

Ill. Rev. Stat. ch. 38, § 12-5. Reckless Conduct

(a) A person who causes bodily harm to or endangers the bodily safety of an individual by any means, com-

mits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.

(b) Sentence.

Reckless conduct is a Class A misdemeanor.